84-301

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

LARRY GORDON LANNING and
SCOTT RAMON TERWILLIGER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE SUPREME COURT

FOR THE UNITED STATES

OCTOBER 1984 TERM

LARRY GORDON LANNING and

SCOTT RAMON TERWILLIGER,

PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Whether United States v. Leon, 35 Cr.L. 3273 (U.S. July 4, 1984), creating a "good faith" exception to the exclusionary rule, applies retroactively.

2. If United States v. Leon, supra, applies retroactively, whether a material misrepresentation regarding the location of a "stash pad" constitutes such recklessness in preparing a search warrant affidavit that evidence seized at the place searched must be suppressed?

3. If United States v. Leon, supra, does not apply retroactively, whether a search warrant issued upon an informant's tip, which (a) was vague as to the location of a "stash pad", (b) indicated no basis for the informant's knowledge, (c) did not disclose the time when information was given to the affiant, and (d) was totally uncorroborated, is sufficient to satisfy the requirements of Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983).

PARTIES TO THE PROCEEDING BELOW

Larry Gordon Lanning and Scott Ramon Terwilliger, Appellants, represented by Marc G. Kurzman, Esq., 601 Butler Square, Minneapolis, Minnesota 55403; United States of America, Appellee, represented by Donald M. Lewis, Assistant United States Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401.

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OPINIONS DELIVERED IN THE COURT BELOW

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GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed, as well as the time of its entry, is May 9, 1984. The statutory provision conferring on this Court jurisdiction to review judgment in question by Writ of Certiorari is 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS WHICH THE CASE INVOLVES

U.S. CONST. amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendants were convicted for possession of marijuana with intent to distribute and with conspiracy to distribute marijuana. 21 U.S.C. Sec. 841(a)(1) 846. These convictions rest on evidence obtained through a search conducted pursuant to warrant. The affidavit supporting the search warrant

relevant in this case states:

> Informant number 2 has advised Agent Haight that during the past twelve months, he has talked to Larry Lanning on a number of occasions and been informed by Lanning that he and an associate by the name of Scott Terwilliger are engaged in the business of transporting several hundred pound quantities of marijuana from Florida to Minnesota for distribution . . . . Informant number 2 has been advised by Lanning and Terwilliger that they have each made such trips and have always used automobiles, three of which are described as: a brown 1981 Ford LTD; a second brown 1981 Ford LTD; and a 1981 samon-colored Ford Thunderbird.
>
> Informant number 2 has spoken with both Lanning and Terwilliger within the past two weeks and been advised by them that one or the other would be travelling to Florida for an additional load of several hundred pounds of marijuana and returning to Minneapolis-St. Paul on or about May 30 through June 1, 1982 . . . . Your affiant has been advised by Kenny Vandesteege, Minneapolis Police Department, that at approximately 10:45 a.m. on June 2, 1982, he observed a 1981 brown Ford LTD arrive at a single family residence with a detached double garage, located at 4901 Three Point Boulevard, Mound, Minnesota. The operator of the vehicle was a white male who matched the physical description of Scott

> Terwilliger. Informant number 2 advises that Larry Lanning occupies this address. Terwilliger was observed entering the residence on arrival, exiting the residence at 12:15 p.m. with a white male who matched the description of Larry Lanning . . . . At approximately 1:40 p.m., Terwilliger returned to the garage and opened it and drove a 1981 samon-colored Thunderbird out of the garage . . . .
>
> Your affiant had previously been advised by informant number 2 that Lanning and Terwilliger utilized a "stash pad" located just north of Minneapolis, for storing and repackaging marijuana.
>
> On June 2, 1982, Terwilliger was observed to drive the 1981 samon-colored Thunderbird from Mound to a rural location near Corcoran, Minnesota north of Minneapolis . . . .

The farm residence near Corcoran was searched and marijuana was found.

The underlying factual basis for the informant's knowledge was not described. Moreover, the affiant gave no indication of when he had been advised by the informant about the "stash pad."

According to the affidavit, police followed appellant to a "location near Corcoran, Minnesota, north of Minneapolis." In fact, Corcoran is west of Minneapolis. A white farm residence there was searched; less than ten pounds of marijuana were discovered.

NO REVIEW OF THE JUDGMENT OF THE STATE COURT IS SOUGHT

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The basis for federal jurisdiction in the Court of Appeals for the Eighth Circuit is 28 U.S.C. Section 1254.

REASONS FOR THE ALLOWANCE OF THE WRIT

This case presents a question of first impression; whether United States v. Leon, supra, applies retroactively.

In Leon, this Court established a "good faith" exception to the exclusionary rule. The search in this case occurred well before Leon was decided.

In Desist v. United States, 394 U.S. 244 (1969), this Court held that when there has been a chance in the law in Fourth Amendment cases, the date of the search and not the date of the trial is the critical time for the purpose of determining which law governs. Cf. Warden v. Hayden, 387 U.S. 294 (1967), retroactive application of a case merely "clarifying a rule from a previous statement" made by this Court.

Assuming for the sake of argument that United States v. Leon, supra, does apply to this case, the evidence seized should still be suppressed. Under Leon, suppression is still appropriate "if the officers were dishonest or reckless in

preparing their affidavit . . . ." In this case, the officers intentionally misled the Magistrate into thinking that the place to be search was north of the Twin Cities. In fact, it was west of the Twin Cities. This material misstatement regarding the locus of the search is the kind condemned in Leon.

Assuming, however, that Leon does not apply to this case, and that Illinois v. Gates , supra, applies instead, suppression should still result. In Gates, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the court abandoned the Aguilar-Spinelli "two-pronged" test, reafirming the "totality of the circumstances" approach.

In footnote 11 of Illinois v. Gates, the Court specifically stated that they "in no way abandoned Spinelli's concern for the trustworthiness of informers and

for the principal that it is the magistrate who must ultimately make a finding of probable cause." They directed reviewing courts to earlier cases determined by the Supreme Court, indicating, for example, that

> a sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do.

76 L.Ed.2d at 548-49. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause and wholly conclusory statements fail to meet this requirement. Likewise, "an officer's statement that 'affiants have received reliable information from a credible person and believe that heroin is stored in the home is likewise inadequate. Aguilar v. Texas, 378 U.S. 108 (1964).'" 76 L.Ed.2d at 549.

There is no basis for believing the Corcoran property was the aforementioned "stash pad". Since the affiant gave no indication of how the informant drew his conclusion about the existence or location of a "stash pad" or when he had been advised by the informant about the "stash pad," this "tip" clearly did not establish probable cause to search the Corcoran property.

At first blush, this affidavit superficially appears to be similar to that approved by the Supreme Court in Gates. In the case at bar, however, none of the information relative to alleged trips to and from Florida was corroborated. Terwilliger could as easily have come from the corner 7-11 Store as from Florida prior to his arrival at Lanning's residence. In Gates, however, police corroborated

travel to Florida by airplane, an overnight stay under suspicious circumstances, the immediate departure for home, and the immediate departure for home the next morning.

There were no observations of the loading or unloading of bales or other packages at the Lanning or Corcoran property.

Because there was no probable cause to believe that contraband would be found at the location search, Appellants' convictions should be reversed and the matters remanded to the trial court for further proceedings.

CONCLUSION

For the reasons set forth above, Petitioner's respectfully request that this Petition be granted.

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Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2643-MN September Term, 1983

United States of America,
Appellee,

vs.

Larry Gordon Lanning,

Appellant.

No. 83-2726-MN

Appeals from the United States District Court for the District of Minnesota.

United States of America,
Appellee,

vs.

Scott Ramon Terwilliger,
Appellant.

Petition of appellants for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and is hereby, denied.

July 17, 1984

APPENDIX B

B-1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2643
No. 83-2726

United States of America, *
*
Appellee, *
* Appeals from the
vs. * United States
* District Court
Larry Gordon Lanning, * for the District
Scott Ramon Terwilliger, * of Minnesota
*
Appellants. *

Submitted: April 10, 1984

Filed: May 9, 1984

Before BRIGHT and BOWMAN, Circuit Judges,

and SWYGERT, Senior Circuit Judge.*

PER CURIAM.

Larry Gordon Lanning and Scott

Ramon Terwilliger appeal from their

convictions for possession of marijuana with intent to distribute and for conspiracy to distribute marijuana. 21 U.S.C. §§ 841(a)(1), 846. These convictions rest on evidence obtained through searches conducted under the authority of two search warrants. The sole issue presented by this consolidated appeal is whether the affidavits supporting these warrants, which were based on tips supplied by informants, were sufficient to satisfy the requirements of Illinois v. Gates, 103 S.Ct. 2317 (1983).

Appellant made a pretrial motion to suppress the evidence obtained as a result of the execution of the search warrants. The magistrate[1] who considered this motion issued a thorough and

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*The Honorable Luther M. Swygert, United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

well-reasoned report in which he recommended that the motion be denied. Carefully applying the "totality of the circumstances" test adopted by the Supreme Court in Gates, the magistrate concluded that the affidavits had established that probable cause existed to conduct the searches in question. The District Court,[2] after a de novo review of the record, adopted the magistrate's report and recommendation and denied the motion to suppress.

Having carefully studied the record, including the affidavits and search warrants in question, the report and recommendation of the magistrate, the order of the District Court denying the motion to suppress, and the briefs and the oral arguments of the parties on this appeal, we conclude that the order of the District Court is based on findings of

fact that are not clearly erroneous and, further, that no error of law appears. Accordingly, the judgment below is AFFIRMED. See 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not for Publication]

---

[1]The Honorable Floyd E. Boline, United States Magistrate, District of Minnesota.

[2]The Honorable Paul A. Magnuson, United States District Judge, District of Minnesota.

APPENDIX C

C-1

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

United States of America,

Plaintiff,

vs. ORDER

Larry Gordon Lanning and CR-3-83-75

Scott Ramon Terwilliger,

Defendants.

This matter comes before the Court upon the timely objections filed by defendants Lanning and Terwilliger to the Report and Recommendation of United States magistrate Floyd E. Boline dated August 12, 1983.

Defendants object to the recommendation that defendants' motions to suppress evidence seized in the execution of search warrants at 21410 97th Avenue North,

Corcoran, Minnesota and 4901 Three Point Boulevard, Mound, Minnesota, be denied. In particular, defendants contend that the affidavit for the search warrant for the Corcoran property contained misrepresentations necessary to a determination of probable cause; that the affidavit on its face failed to establish probable cause; and that the supporting facts for the search of the Mound premises were derived from the illegal search of the Corcoran premises.

The defendants have stipulated that the District Court is not required by 28 U.S.C. 636 to review a transcript of the hearing in order to resclve all objections made to this Report and Recommendation.

The court has made a de novo review of the record, apart from the transcript, and concurs with the Report of Magistrate Boline.

Accordingly, the court adopts and approves the Report and Recommendation of August 12, 1983 and based thereon,

IT IS ORDERED:

1. That defendant Lanning's Motion to Join In All Pretrial Motions Filed by Codefendant is granted.

2. That the defendants' Motion for Disclosure of Electronic Surveillance is denied as moot.

3. That the defendants' Motion for Preservation of Notes and Tape Recordings is denied as moot.

4. That the defendants' Motion for Disclosure of Impeaching Information is granted to the extent that the government shall supply all information required under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1971). In all other respects, defendants' motion is denied.

5. That the defendants' Motion for Early Disclosure of Brady/Agurs/Giglio Material, Jencks Act material, 18 U.S.C. 3500 and Rule 16, Federal Rules of Criminal Procedure Material is denied as moot.

6. That the defendants' Motion for Disclosure of Informants is granted in part and denied in part. Defendants' motion is granted to the extent that the informant, Richard Wayne Habig, shall be produced for an interview no later than August 12, 1983. The government need not disclose the current whereabouts of Mr. Habig. In all other respects the motion of the two defendants is denied.

7. That the defendants' Motion to Interview Government Controlled Witnesses is denied as moot.

8. That the defendants' Motion for List of Government Witnesses is denied.

9. That the defendants' Motion for Bill of Particulars is denied.

10. That the defendants' Motion for Disclosure of Grand Jury transcripts is denied.

11. That the defendants' Motion to Sever is denied.

12. That the defendants' Motion to Suppress is denied.

Dated: August 30, 1983.

Paul A. Magnuson
United States District Judge

APPENDIX D

D-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-83-75

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REPORT AND RECOMMENDATION

LARRY GORDON LANNING and
SCOTT RAMON TERWILLIGER,

Defendants.

A hearing was held in the above-entitled action before the undersigned United States Magistrate on August 2, 1983, on defendant Lanning's Motion to Join In All Pretrial Motions Filed by Codefendant and Motion to Suppress Evidence; and on defendant Terwilliger's Motion for Disclosure of Electronic Surveillance, Motion for Preservation of Notes and Tape Recordings, Motion for List of Government Witnesses, Motion for Disclosure of Impeaching

Information, Motion for Early Disclosure of Brady/Aqurs/Giglio material, Jencks Act material, 18 U.S.C. 3500, and Rule 16, Federal Rules of Criminal Procedure, Motion for Disclosure of Grand Jury Transcripts, Motion for Bill of Particulars, Motion to Sever, Motion to Interview Government Controlled Witnesses, and Motion to Suppress Evidence.

Defendant Lanning was present in court with his counsel, Lee Bissonnette, Esquire. Defendant Terwilliger was present in court with his counsel, Marc G. Kurzman, Esquire. The government was represented by Assistant United States Attorney Donald M. Lewis.

The defendants are charged in a two count indictment. Count I charges that both defendants, aiding each other, unlawfully possessed with intent to distribute about 31 pounds of marijuana,

in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code Section 2. Count II charges both defendants with conspiring to distribute, and conspiring to possess with intent to distribute marijuana, in violation of title 21, United States Code, Section 846.

DEFENDANT LANNING'S MOTION TO JOIN IN ALL PRETRIAL MOTIONS FILED BY CODEFENDANT

Defendant Lanning's motion should be granted.

MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE

This motion was filed by defendant Terwilliger and joined in by defendant Lanning. At the hearing, counsel for the government advised the court that no electronic surveillance was utilized in this case. The motion of the two defendants should be denied as moot.

MOTION FOR PRESERVATION OF NOTE AND TAPE RECORDINGS

This motion was filed by defendant Terwilliger, and joined in by defendant Lanning. At the hearing, counsel for the government advised the Court that no tape recordings were made in this case, and that he would instruct government agents to preserve whatever notes they have. The motion of the two defendants should be denied as moot.

MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION

This motion was filed by defendant Terwilliger, and joined in by defendant Lanning. At the hearing, counsel for the government stated that he would supply the defendants with all material required under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1971).

This motion of the two defendants should be granted to the extent that the

government should supply all information required under Brady and Giglio. In all other respects, the motions of the two defendants should be denied.

MOTION FOR EARLY DISCLOSURE OF BRADY/AGURS/GIGLIO MATERIAL, JENCKS ACT MATERIAL, 18 U.S.C. 3500 AND RULE 16, F.R.Cr.P.

This motion was filed by defendant Terwilliger, and joined in by defendant Lanning. Counsel for the government has already stated that he would supply defendants with all material required under Brady and Giglio. Counsel for the government further stated that he is maintaining an open file policy in this case. Counsel for the government further stated that he would furnish Jencks Act material to the defendant 72 hours before trial. With this understanding, the defendants withdrew their motions. Defendants' motions having been withdrawn, they should be denied as moot.

MOTION FOR DISCLOSURE OF INFORMANTS

This motion was filed by defendant Terwilliger, and joined in by defendant Lanning. At the hearing, counsel for the government advised the defendants that the informant that had participated in the activities that resulted in the two counts of the indictment is named Richard Wayne Habig. Along with the request for the identification of this informant, the defendants have requested that he be produced for an interview. Counsel for the government advised the court that another informant involved in this case was not a witness to any of the facts leading to the indictment, and that he would not be a witness in the trial. Based upon this representation the defendants withdrew their motion as to the second informant. The motion of the two defendants should be granted to the extent

that the informant, Richard Wayne Habig, should be produced for an interview no later than August 12, 1983. The government need not, however, disclose the current whereabouts of Mr. Habig. In all other respects, the motion of the two defendants should be denied.

MOTION TO INTERVIEW GOVERNMENT CONTROLLED WITNESSES

This motion was filed by defendant Terwilliger, and joined in by defendant Lanning. At the hearing, counsel for defendant stated that as a result of the disclosure of Mr. Habig as the informant, this motion was now moot. The motion of the two defendants should be denied as moot.

MOTION FOR LIST OF GOVERNMENT WITNESSES

This motion was filed by defendant Terwilliger and joined in by defendant Lanning.

In United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971) the Court said:

> "In a non-capitol case an accused has no constitutional right to require the production of the names and addresses of possible witnesses. Drews v. Minnesota, 407 F.2d 1307 (8th Cir. 1969); Barnes v. United States, 347 F.2d 925, 929 (8th Cir. 1965). Although it has been recognized that in a proper case, disclosure of prosecution's witnesses may be ordered, this Circuit has uniformly held that such matters are within the discretion of the trial court. United States v. Harflinger, 436 F.2d 928, 936 (8th Cir. 1970); Barnes v. United States, supra, 347 at 929."

The motions of both defendants should be denied.

MOTION FOR BILL OF PARTICULARS

This motion was filed by defendant Terwilliger and joined in by defendant Lanning.

It is first noted that the government has furnished defendants with all information required under Rule 16, Federal Rules of Criminal Procedure, and has maintained an open file policy in this case.

Defendants' motions seek detailed discovery, and a pretrial disclosure of the evidence the government intends to use at trial. The demands are extensive and will not be reproduced here.

The granting of a bill of particulars is within the sound discretion of the trial court. United States v. Buffington, 578 F.2d 213 (8th Cir. 1978); United States v. Sellers, 603 F.2d 53 (8th Cir. 1979).

The purpose of a bill of particulars was described in United States v. Little, 562 F.2d 578, 581 (8th Cir. 1977) as follows:

> "The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial. United States v. Miller, 543 F.2d 1221, 1224 (8th Cir. 1976), cert. denied, 429 U.S. 1108 (1977) ... "

A bill of particulars should not be used to obtain the legal theories of the government. Kempl v. United States, 151 F.2d 680 (8th Cir. 1945); Rose v. United States, 149 F.2d 755 (9th cir. 1945). The government is not required to define legal terms in a bill of particulars, United States v. Miller, 543 F.2d 1221 (8th Cir. 1976).

In United States v. Adcock, 558 F.2d 397, 405 (8th Cir.), cert. denied, 434 U.S. 921 (1977) the Court of Appeals found no abuse of discretion in the denial of a motion for a bill of particulars where the lower court had said:

> Because the nature of the charges against the defendant are adequately disclosed to him, and in view of the detailed nature of the indictments and the fact that the Government has already disclosed much information to the defendant, the request ... must be denied."

See also United States v. Bowles, 574 F.2d 970 (8th Cir. 1978) where the court refeers to the open file which the government had made available to defendant; and United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976).

I have examined the indictment and have determined that it sufficiently informs the defendants of the charges against them and will permit them to plead a conviction thereof as a bar to another prosecution for the same offense. The motions of both defendants should be denied.

MOTION FOR DISCLOSURE OF GRAND JURY TRANSCRIPTS

This motion was filed by defendant Terwilliger and joined in by defendant Lanning. Defendants assert the following grounds for the motion:

1. To determine the credibility of witnesses.

2. To discover inconsistent statements made by witnesses (credibility - impeachment).

As mentioned earlier, the Government will furnish the defendants with Jencks Act material, including grand jury transcripts of trial witnesses, 72 hours before trial. The government will also be furnishing defendants with all Brady and Giglio material prior to trial.

The motion is unsupported by facts or affidavits and contains only bare speculation. This is not a showing of particularized need necessary to gain

access to the grand jury transcripts.

In United States v. Harbin, 585 F.2d 904, 907 (8th Cir. 1978) the Court said:

> "Appellant contends that the trial court committed prejudicial error in overruling his motion to inspect grand jury minutes and to produce investigative reports. Appellant in his motion before the trial court stated no particularized need for the production of grand jury minutes. He makes only a general plea that an inspection of the minutes might yield a ground upon which to move to dismiss the indictment. The trial court therefore did not err in refusing to breach the secrecy of the grand jury. United States v. Knight, 547 F.2d 75 (8th Cir. 1976); see generally, In Matter of Disclosure of Testimony Before Grand Jury, 580 F.2d 281 (8th Cir. 1978). Appellant's contention on appeal that the particularized need prior to trial of witnesses is not an adequate basis upon which to disclose grand jury minutes. Hanger v. United States, 398 F.2d 91, 97 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22 L.Ed.2d 124 (1969)."

It is clear from the above quote from Harbin that the impeachment of witnesses is not an adequate ground for production of grand jury minutes. See also, United States v. Brown, 574 F.2d 1274, 1276 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Thompson, 576 F.2d 784, 786 (9th Cir.), cert denied, 99 S.Ct. 2001 (1979).

It is equally clear that the government is not required to present evidence undermining the credibility of its witnesses to the grand jury. United States v. Smith , 552 F.2d 257, 261 (8th Cir. 1977); Lorraine v. United States, 396 F.2d 335 (9th Cir. 1978), cert. denied, 393 U.S. 933. The motions of both defendants should be denied.

MOTION TO SEVER

This motion was filed by defendant Terwilliger and joined in by defendant Lanning.

Defendants assert the following grounds for their motion:

1. A joint trial will prejudice their right to a fair trial.

2. The use of a confession of one defendant in a joint trial would violate the other defendant's Sixth Amendment right of confrontation and cross-examination, citing Bruton v. United States, 391 U.S. 123 (1968).

3. Inconsistent defenses may lead one attorney to comment on a codefendant's silence, citing DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962); United States v. DeLaCruz-Bellinger, 442 F.2d 723 (9th Cir. 1970).

4. One defendant may want to call the other defendant as a witness for exculpatory evidence, but may be unable to because of the codefendant's exercising his Fifth Amendment right against self-incrimination.

Rule 8(b) allows for the joinder of defendants in the same indictment if they are alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses. Rule 8(b) provides:

> "(b) JOINDER OF DEFENDANTS
> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The defendants are charged jointly with one substantive count of violating the narcotics laws and with conspiracy to distribute marijuana in violation of 21 U.S.C. 846. The indictment on its face meets the joinder requirements of Rule 8(b).

The question of whether to grant severance is one addressed to the sound

discretion of the trial judge; the trial judge has been given wide latitude in this area. United States v. Jackson, 549 F.2d 517, 523 (8th Cir.), cert. denied, sub nom Muhammed v. United States, 430 U.S. 985 (1977); United States v. Johnson, 540 F.2d 954, 959 (8th Cir.), cert. denied, 429 U.S. 1025 (1976); United States v. Robinson, 432 F.2d 1348, 1351 (D.C. Cir. 1970); United States v. Brim, 630 F.2d 1307 (8th Cir. 1980).

The general rule is that persons jointly indicted should be tried together. United States v. Bolts, 558 F.2d 316 (5th Cir.), cert denied, 434 U.S. 930 (1977). This is true in a conspiracy case or where the defendants are alleged to have participated in the same series of acts or transactions, and where complicity of the defendants is based largely upon the same evidence. United States v. Losing, 560

F.2d 906 (8th Cir.), cert denied, 434 U.S. 969 (1977); United States v. Krohn, 573 F.2d 1382 (10th Cir.), cert. denied, 98 S.Ct. 2857 (1978), 436 U.S. 949 (1978). It is not a requirement for joinder that each defendant participated in every act constituting each joined offense. Haggard v. United States, 369 F.2d 968 (8th Cir. 1966), cert. denied, 386 U.S. 1022 (1967); United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978); United States v. Roselli, 432 F.2d 879 (8th Cir. 1970), cert denied, 401 U.S. 924 (1971). As stated in United States v. Jackson, 549 F.2d 517, 525, 526 (8th Cir. 1977):

> "The preference for joint trials of defendants, jointly indicted, particularly where conspiracy is charged, United States v. Hutchinson, supra at 492, is not limited by any requirement that the quantum of evidence of each defendant's

> culpability be equal. It is indeed hard to imagine a multiple defendant case in which the evidence against individual defendants is either quantitatively or qualitatively equivalent. A defendant is not entitled to severance merely because the evidence against a codefendant is more damaging than the evidence against him ... The presentation of more evidence applicable to one defendant than to his codefendants is simply a fact of life in multiple defendant cases. The greater amount of evidence introduced against Jackson here was not far more damaging than the evidence relating to his codefendants, but only more from a quantitative standpoint. The quantitative inequality of evidence adduced provides no ground for a severance."

Jackson is a leading case on severance in the Eighth Circuit. In discussing the general rule on severance the Court stated at pp. 523-524:

> "It is the general rule that persons charged in a conspiracy should be

tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts. (Cases cited) Severance will be allowed upon a showing of real prejudice to an individual defendant ... However, the motion to sever is addressed to the discretion of the trial court ... and a denial of severance is not grounds for reversal unless clear prejudice and an abuse of discretion are shown --- A defendant must show something more than the mere fact that his chances for acquittal would have been better had he been tried separately ... He must 'affirmatively demonstrate that the joint trial prejudiced [his] right to a fair trial.' (Cases cited). Thus, before the refusal to sever may be deemed an abuse of discretion on

the part of the trial court, prejudice to a defendant's right to a fair trial must be established."

See also, United States v. Wright, 564 F.2d 785 (8th Cir. 1977); United States v. Burchinal, Slip Opinion No. 80-2025 (8th Cir., Aug. 12, 1981).

Defendants have alleged that if they were tried separately they could call their codefendant as a witness to obtain exculpatory evidence.

In United States v. Marable, 574 F.2d 224, 230-31 (5th Cir. 1978) the court said:

> "To obtain a severance based on a defendant's desire to call a co-defendant as a witness on his behalf, the defendant must prove a bona fide need for the testimony, the substance of the desired testimony, the exculpatory effect of the desired testimony, and that the co-defendant would indeed have testified at a separate trial."

The Eighth Circuit said virtually the same thing in United States v. Graham, 548 F.2d 1302, 1311 (8th Cir. 1977):

> "A defendant is not entitled to severance on the weight of an 'unsupported possibility' that a codefendant's testimony might be forthcoming at a separate trial. United States v. Kahn, 381 F.2d 824, 841 (7th Cir.), cert. denied, 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967); See United States v. Somers, supra, at 731. A defendant's assertion that his codefendant might testify at a separate trial must find some independent support in the record."

See also United States v. Eason, 569 F.2d 457 (8th Cir. 1978); United States v. Smolar, 557 F.2d 13 (1st Cir.), cert. denied, 434 U.S. 971 (1977); United States v. Jackson, supra; United States v. Wofford, 562 F.2d 582 (8th Cir. 1977), cert. denied, 435 U.S. 916 (1978); United States v. Gay, 567 F.2d 916 (9th Cir.),

cert. denied, 435 U.S. 999 (1978). The defendants have not met these requirements.

Although defendant's motion asserts that the use of a confession of one defendant in a joint trial would violate their Sixth Amendment right to confrontation, and Bruton v. United States, 391 U.S. 123 (1968), they filed no motion to suppress confessions or statements because neither defendant gave a statement. Their motion is moot as to this point.

It is possible that inconsistent defenses may be offered by the defendants during the trial. Conflicting and antagonistic defenses being offered at trial do not necessarily require granting a severance, even if hostility surfaces or defendants seek to blame one another. The fact that one defendant may take the stand

and cast the blame on a co-defendant is not sufficient reason to require separate trials. United States v. Joyce, supra at 9; United States v. Perez, 489 F.2d 51, 68 (5th Cir. 1973), cert. denied, 417 U.S. 945; United States v. Martinez, 466 F.2d 679, 686-687 (5th Cir. 1972), cert. denied, 414 U.S. 1065; United States v. Brady, supra at 1128.

The test for determining whether a severance is required where the defenses of co-defendants are generally antagonistic was set out in United States v. Robinson, supra, 1351 where the Court said:

> "[O]ne must show more than the fact that co-defendants whose strategies were generally antagonistic were tried together. Robinson v. United States, 93 U.S. App. D.C. 347, 210 F.2d 29 (1954). At the very least, it must be demonstrated that a conflict is so prejudicial that differences

are irreconcilable, and 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' Rhone v. United States, 125 U.S. App. D.C. 47, 48, 365 F.2d 980, 981 (1966)."

If inconsistent defenses are presented, a cautionary instruction can be given to the jury. The Seventh Circuit in United States v. Hutul, 416 F.2d 607, 620-621 (7th Cir. 1969), cert. denied, 396 U.S. 1024, quoted with approval from the case of Dauer v. United States, 189 F.2d 343, 344 (10th Cir. 1951), cert. denied, 342 U.S. 898 in framing the test for determining whether antagonistic defenses among co-defendants requires a severance:

> "'*** The mere fact that there is hostility between defendants or that one may try to save himself at the expense of another is in itself along not sufficient grounds to require separate trials. It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead one to conclude

> that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted.'"

If the defendants do testify at the trial and present conflicting stories, those conflicts in the testimony will be for the jury to resolve, and the fact that the jury may be called upon to resolve conflicting testimony does not mean that the defendants will have been denied a fair trial. See also United States v. Troutman, 458 F.2d 217, 221 (10th Cir. 1972); United States v. Barber, 442 F.2d 517, 530 (3d Cir.), cert denied, sub nom Robinson v. United States, 404 U.S. 846 (1971).

Defendants argue that one of them may want to comment on the fact that the other did not testify, citing DeLuna v. United States, 308 F.2d 140, 141 (5th Cir. 1962).

In DeLuna the appellant did not take the stand; a co-defendant took the stand, threw the blame on the appellant, and then commented on the fact that appellant did not testify. In reversing the conviction the court said at p. 154:

> The court's instructions were intended, of course, to neutralize the effect of the comments. But considering the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to deLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to deLuna's silence."

In Hayes v. United States, 329 F.2d 209 (8th Cir. 1964), the trial judge ordered counsel fr appellant not to comment in his argument to the jury upon the failure of the co-defendants to

testify. On appeal DeLuna was cited but the conviction was affirmed.

Judge Ross in United States v. Metz, 625 F.2d 775, 778 (8th Cir. 1980) discussed "important limitations" on the holding in DeLuna. Judge Ross stated:

> "In addition, this court has previously had occasion to discuss the factual setting in deLuna, and has noted some important limitations on the holding in that case. In Hayes v. United States, 329 F.2d 209, 211-22 (8th Cir.), cert. denied, 377 U.S. 980, 84 S.Ct. 1883, 12 L.Ed.2d 748 (1964), under slightly different circumstances, this court distinguished the deLuna decision on the following grounds:
>
> We do not here have a situation where Bennett or any of the testifying defendants pinned any criminal acts upon non-testifying defendants. here, unlike the situation in deLuna, Bennett did not place the sole blame for the wrongful acts charged upon a co-defendant. Bennett made no charges

> against Hayes or Clevenger with respect to any issue material to his defense.

Although the Hayes case involved different legal issues than the present appeal, as previously mentioned, we find the distinctions drawn in that case to be applicable for our purposes. In this case, as in Hayes, we have a situation where the codefendants have not in any manner attempted to place the blame solely on one defendant. Consequently, we find in this case none of the 'head-on collision between *** defendants, the repetition of the comments, and the extended colloquy between the trial judge and the lawyers ***' which were held to be prejudicial in United States v. deLuna, supra, 308 F.2d at 154. In fact, the objections and the discussion which followed the alleged prejudicial remarks in this case were made out of the range of the jury's hearing."

I find the Metz decision to be controlling here. Although defendants have said that one may want to comment on the silence of the other, there is no evidence that "we have a situation where the codefendants have "attempted to place the blame solely on one defendant." We fact no "head-on collision." At this

stage in the proceedings it cannot even be determined whether the two defendants will or will not elect to take the stand.

Defendants also imply that a separate trial would be more fair. In ruling on a motion for severance the court must balance the inconvenience and expense of separate trials against the prejudice that could possibly result from joint trial of the defendants. United States v. Brim, supra, at page 4. The inconvenience of a severance in this case would be considerable while the possibility of prejudice from a joint trial is minimal.

The motion of defendants for severance and separate trial should be denied.

MOTION TO SUPPRESS

Defendants have moved to suppress evidence obtained as a result of the execution of a search warrant on June 2, 1982, at 21410 - 97th Avenue North,

Corcoran, Minnesota. Defendants argue that the search warrant affidavit on its face is insufficient to establish probable cause to believe that contraband would be found at the Corcoran address, under the "totality of the circumstances" test adopted by the United States Supreme Court in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983). Defendants also claim that the search warrant affidavit is fatally defective because it contains material misrepresentations of fact, which misled the issuing magistrate in his determination that probable cause existed. Since no additional evidence was presented at the hearing, the validity of the affidavit is to be determined from within its four corners. See United States v. Leichtling, 684 F.2d 553, 555 (8th Cir. 1982).

The affidavit states that the confidential reliable informants (CRIs) have given information to law enforcement officers on a number of occasions, which proved to be reliable, and which resulted in the convictions of a number of persons. It also states that CRI #1 informed the affiant that he knew from personal knowledge that defendant Lanning had been transporting large quantities of marijuana and cocaine by automobile from Florida to Minneapolis since 1981. The affidavit further states a reasonable basis for CRI #2's claim that defendants are involved in the transportation and distribution of marijuana from Florida. On several occasions CRI #2 has spoken to the defendants individually, who told him that they are engaged in such activities. CRI #2 informed the affiant that defendants take turns making automobile trips to

Florida, and identified three of the cars used by defendants; he also detailed that each of the defendants had told him that one or the other would be going to Florida to pick up several hundred pounds of marijuana, and would be returning to the Twin Cities around May 30 to June 1, 1982. CRI #2 further told the affiant that defendants used a "stash pad" just north of Minneapolis to store and repackage the marijuana.

The corroborative effort and independent investigation of Officer Vandesteege can be summarized as follows: Officer Vandesteege observed defendant Terwilliger arrive at defendant Lanning's house in a 1981 brown LTD on June 2, 1982. About two hours later defendants went from the house into Lanning's detached garage by opening the overhead door and closing it behind them. About 25 minutes later

the defendants exited the garage in the same way they entered and went back into the house. Defendant Terwilliger returned to the garage about 40 minutes later, opened the front door, drove a 1981 salmon-colored Thunderbird out of the garage, and put the 1981 LTD into the garage. He then drove to 21410 - 97th Avenue North, Corcoran, Minnesota, which is north-west of Minneapolis. Officer Vandesteege followed defendant to this address. There he observed a farm house and garage on the premises. Defendant Terwilliger apparently went into the farm house for about 1-1/2 hours. During the time the front door of the garage was open and Officer Vandesteege observed an electrician at work. After the electrician left, the Thunderbird was backed into the garage and the door closed. A few minutes later a pickup

truck was backed up to the garage and the driver went inside through a side door using a key. About 30 minutes later the truck driver left. Shortly thereafter the Thunderbird was driven away from the premises. Both the Thunderbird and LTD used by Terwilliger and observed by officer Vandesteege matched the descriptions of two of the three automobiles described by CRI #2.

Until recently, the constitutionality of a search warrant affidavit based upon information provided by a confidential, reliable informant was to be determined under the two-prong test developed by the Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). In Illinois v. Gates, supra, however, the Court abandoned this two-prong test and replaced it with "the totality of the circumstances

analysis that traditionally has informed probable cause determinations." Gates, supra at 2332. Under the "totality of the circumstances" test,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 2332.

Under the totality of the circumstances in this case, the Court believes the issuing magistrate was justified in his determination that there was "a fair probability that contraband or evidence of a crime wil be found in a particular place." Id. The observations by Officer Vandesteege of defendants' activities suggest that defendants were

engaged in the secret delivery of something to the Corcoran address. The manner in which the defendants conducted their conversations at the Lanning address and at the Corcoran address also suggest that secrecy was important to them and whatever business they were conducting. Several portions of the information provided by the CRIs proved to be true. "Because an informant is right about some things, he is more probably right about other facts." Spinelli, supra at 427. (White, J. concurring). The magistrate thus had a substantial basis for crediting the hearsay, based upon the corroboration of it by Officer Vandesteege, which "reduced the chances of a reckless or prevaricating tale." Jones v. United States, 362 U.S. 247, 269 (1960). In addition, it is significant that CRI #2's information related "not just to easily

obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." Gates, supra at 2335.

Given all the circumstances set forth in the affidavit, the determination of probable cause by the issuing magistrate was a practical and commonsense conclusion. "[T]he magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." Gates, supra at 2332, citing Jones v. United States, 362 U.S. 257 (1960). The Court, therefore, finds that the warrant was supported by probable cause.

Defendants also allege that the warrant is defective because it contains two material misrepresentations which misled the magistrate in his determination that probable cause existed. The first alleged misrepresentation centers on a

portion of the affidavit which reads as follows:

> "Your affiant had previously been advised by informant number 2 that Lanning and Terwilliger utilized a "stash pad" located just north of Minneapolis, for storing and repackaging marijuana.
>
> On June 2, 1982, Terwilliger was observed to drive the 1981 salmon-colored Thunderbird from Mound to a rural location near Corcoran, Minnesota, north of Minneapolis."

Defendants contend that Corcoran is not north of Minneapolis but west and that the affiant misled the magistrate into believing that Corcoran could be the northern stash pad referred to by CRI #2. The second claimed misrepresentation is that the affiant "broadened his options" in disregard of what CRI #2 had told him with respect to what cars would be used, and what defendant would be driving to and from Florida.

In order to challenge the facts establishing probable cause in a search warrant affidavit on the grounds of material misrepresentation of fact, defendants must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the fourth Amendment requires that a hearing be held at the defendant's request." Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

With respect to the statement that Corcoran is north of Minneapoolis, Corcoran is as much north of Minneapolis as it is west. Although it would have been more accurate for the affiant to have stated that Corcoran was northwest, such

"hypertechnical scrutiny typical of an essay contest ... has been firmly rejected." See, e.g., United States v. Sumpter, 669 F.2d 1215, 1220 (8th Cir. 1982). Search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

United States v. Brown, 584 F.2d 252, 256 (8th Cir. 1978), citing United States v. Ventresca, 380 U.S. 102, 108 (1965). The statement is not so misleading that it would have adversely affected the magistrate's determination. In addition, defendants have not shown that the affiant made the statement intentionally or with reckless disregard for the truth. Since defendants have failed to make the

requisite showing required by Franks, the statement is to be considered in the determination of probable cause.

With respect to the alleged misrepresentation concerning the automobiles and driver, the Court agrees with the government that the fact the affiant had information on May 24 that defendant Lanning would be traveling to Florida in a specific car does not necessarily make the affiant's statement, "one or the other would be traveling to Florida," misleading. The government does not contend that anyone observed either defendant in any particular vehicle go to or return from Florida. Nor does the affidavit so state. These background facts cited by defendants are important only in so far as they establish that defendants would be involved in transporting large quantities of marijuana

in Minnesota around May 30 to June 1, 1982. It was the events observed from this time, specifically June 2, 1982, forward, which established the facts critical for a finding of probable cause. The Court believes that this allegedly false statement is not necessary for a finding of probable cause, and to the extent it is, defendants have not shown it was made intentionally or with reckless disregard for the truth.

Defendant Lanning has also moved to suppress evidence obtained as a result of a search of his premises at 4901 Three Point Boulevard, Mound, Minnesota on two grounds: 1) the affidavit fails to establish the reliability of the informant and the basis for his knowledge, and 2) there as no personal observation of any illegal substance or contraband at the Mound premises.

The affidavit for this search warrant is identical to that used to support the application to search the Corcoran premises, with one additional paragraph. The additional facts presented are that officer Vandesteege observed Defendant Terwilliger drive the Thunderbird back to the Mound address upon completion of the Corcoran rendezvous, that the search of the Corcoran premises resulted in the seizure of marijuana, numerous weapons, $19,000, and documents showing association between the two defendants, and that the Mound address had been verified to be that of defendant Lanning.

Defendant's argument concerning the reliability and basis of knowledge of the informant fails for the reasons set forth above with respect to the Corcoran warrant. With respect to defendant's second assertion, "[i]t is not required

that the affidavit underlying the search allege direct observation of criminal activity in order to justify the issuance of a warrant permitting a search ...' the issuing magistrate may properly rely on normal inferences drawn from the surrounding circumstances and allegations of fact as well as the type of crime," United State v. Brown, 584 F.2d 252, 256 (8th Cir. 1978), including the nature of the suspected contraband, the extent of the suspect's opportunity for concealment, and "normal inferences as to where a criminal would be likely to hide ... property." United States v. Brown, supra at 256, citing United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970). The test, again, is the totality of the circumstances recognized by the Court in Illinois v. Gates, supra.

Defendant Terwilliger began his trip to the Corcoran premises from the Mound premises. he conferred with defendant Lanning for three hours before leaving. When defendants went into Lanning's garage they were careful to close the door behind them in an apparent attempt to avoid observation. Defendant Terwilliger switched cars before leaving the Mound premises, taking a car from defendant Lanning's garage and putting his car into the garage. Defendant Terwilliger returned the Thunderbird to Lanning's garage following the Corcoran meeting. Both of these cars had been identified by CRI #2 as the cars used by the defendants in their drug operation. The search of the Corcoran property verified the information given by CRI #2.

Given all the circumstances, the Court believes that the issuing magistrate was

justified in concluding that there was a fair probability that contraband would be found at the Mound address. See Gates, supra, at 2330, citing Spinelli, supra at 419. Although the supporting facts for the warrant search of Lanning's premises are not quite as strong as for the Corcoran premises, "it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard for probable cause." Gates, supra at 2330, citing Spinelli, supra at 419. "'A magistrate's determination of probable cause should be paid great deference by reviewing courts. A grudging or negative attitude by reviewing courts towards warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant ...'" Gates, supra at 2331 [citations omitted]. The issuing magistrate had a

substantial basis for concluding that probable cause existed to search defendant Lanning's home and automobiles and the Court should not disturb this finding. See Gates, supra at 2336.

Accordingly, it is recommended that defendants' motions to suppress evidence seized in the execution of the search warrants at the Corcoran and Mound premises be denied.

FLOYD E. BOLINE
UNITED STATES MAGISTRATE

Dated: August 12, 1983

Pursuant to Local Rule 14C(b) any party may object to this Report and Recommendation by filing with the Clerk of court, and serving all parties, by august 26, 1983, a writing which specifically identifies those portions of this Report to which objections are made and the basis

of that objection. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

Unless the parties are prepared to stipulate that the district court is not required by 28 U.S.C. 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and cause to be filed by August 26, 1983 a complete transcript of the hearing.